Likewise, I also allowed the defendants' objection that costs should not be paid on a solicitor and client basis as there is no agreement to that effect although there is an obligation to indemnify the plaintiff for all costs incurred under clauses 3 and 4 of the master agreement.

In dismissing the defendants' appeal with costs, I had ordered that judgment be entered against the defendants for the sum of RM1,088,095.15 with interest at the rate of 6.25% per annum on the sum of RM769,877.74 from 30 July 1993, to date of realisation and costs.

PUBLIC FINANCE BERHAD

v.

LEE BEE RUBBER FACTORY SDN. BHD. & 2 ORS.

HIGH COURT, PENANG
TAN SRI DATUK EDGAR JOSEPH JR. SCJ
[CIVIL SUIT NO. 23-111-84]
9 DECEMBER 1993

CONTRACT: Plaintiff obtaining judgment in default on a guarantee agreement - Defendants applying to set aside judgment in default - Application made more than two years after entry of judgment - Whether there were reasons for the delay - Whether judgment was regularly obtained - Whether defendants entitled to set aside judgment - Whether there was a defence on the merits.

The plaintiff and the first defendant entered into a equipment lease agreement whereby in return for the grant of leasing facilities, the first defendant was to make monthly rent installments to the plaintiff. The second and third defendants were the guarantors for the due performance of the first defendant of all its obligations under the equipment lease agreement. On the first defendant's default in making repayments, the plaintiff commenced action against the second and third defendants for the outstanding balance. The plaintiffs obtained judgment in default against the defendants and the defendants applied to set aside the judgment in default.

The defendants contended that the judgment was irregular as the interest allowed on the judgment was in excess of that permitted by the pre-amended O. 42 r. 12 of the Rules of the High Court 1980 (RHC 1980). The defendants also claimed to have a defence on the merits and raised the plea of *non est factum*. The third defendant further claimed that she had been unduly influenced into signing the guarantee agreement by her husband, the second defendant.

Held:

[1] It is permissible to enter judgment with interest on the judgment debt exceeding the statutory rate of 8% per annum if there was an independent covenant as to the rate of interest, in which event, the doctrine of merger would be inapplicable.

[2] In the present case the claim for interest was based upon Article 19 of the Equipment

Lease Agreement which stipulated in Item (10) of the Schedule that the rate of interest be 2% per month. The provisions of Article 19 are not merely ancillary but constitute an independent covenant for the payment of interest at the stipulated rate.

[3] By virtue of clauses (1) and (2) of the guarantee agreement, Article 19 of the Equipment Lease Agreement was incorporated by reference into the guarantee agreement and applied to the second and third defendants. In the circumstances there was no substance in the contention that the judgment was irregularly obtained.

[4] As directors and shareholders of the the first defendant, it was the second and third defendants' duty to know the nature and effect of the documents they were signing. It is therefore impossible to give the slightest credence to their allegation that they were mistaken about the contents of the guarantee agreement or that there had been any misrepresentation on the part of the plaintiff company.

[5] Having regard to the surrounding circumstances relevant to the issue of the validity of the guarantee agreement, the version appearing in the uncontradicted affidavit of the attesting witness Mr. Ooi, that before the execution of the agreement he had fully explained the terms and conditions thereof to the second and third defendants, was most probably true.

[6] At all material times the second and third defendants knew and approved of the contents of the guarantee agreement and upon the affidavit evidence the plea of undue influence was not available to the third defendant.

[7] The second and third defendants' explanation for their inaction in defending the suit, namely their ignorance of the rules of procedure and their rights in the suit, was transparently false since their previous solicitors had entered an appearance on their behalves so that at the time default judgment was entered they were in fact represented by solicitors and therefore must have known of their rights and duties.

[8] In the circumstances of the case, the inevitable conclusion was that the second and third defendants had been guilty of laches, their conduct had not been *bona fide* and there had been a deplorable lack of candour on their part.

[Application to set aside judgment in default of defence dismissed with costs].

Cases referred to:
Public Bank Bhd. v. Hara Industries [1987] 1 CLJ 399 ***(refd)***
Supreme Finance (M) Bhd. v. Koo Sin Ken [1987] 1 CLJ 374 / [1987] 1 MLJ 374 ***(refd)***
Malaysia Building Society Bhd. v. Lim Kheng Kim & Ors. [1988] 2 CLJ 675 / [1988] 3 MLJ 175 ***(foll)***
American International Co. Ltd. v. Union Builders (M) Sdn. Bhd. [1973] 1 MLJ 95 ***(refd)***
Malaysian International Merchant Bankers Bhd. v. Dhanoa Sdn. Bhd. [1988] 1 CLJ 8 / [1988] 1 MLJ 257 ***(refd)***
Popple v. Sylvester [1883] 22 Ch. D 98 ***(cit)***
Re Sneyd, ex parte Fewings [1884] 25 Ch. D 338 ***(cit)***
London Borough of Ealing v. El Isaac & Anor. [1980] 2 AER 548 ***(refd)***
Lowry v. Williams [1895] 1 IR 274 ***(cit)***
Bank of China v. Maria Chia Soon Lan [1976] 1 MLJ 41 ***(cit)***
Phillips v. Hutchinson [1946] VLR 270 ***(cit)***
Bank of New South Wales v. Rogers [1941] 65 CLR ***(cit)***
Taylor v. Johnson [1882] 19 Ch. D 603 ***(cit)***
Radcliffe v. Price [1902] 18 TLR 446 ***(cit)***
Westmelton (Vic) Pty. Ltd. v. Archer [1982] VR 305 ***(cit)***
Allcard v. Skinner [1887] 36 Ch. D 145 ***(cit)***
Yerkey v. Jones [1939] 63 CLR 649 ***(refd)***
Wheeler v. Sargeant [1893] 69 LT 181 ***(cit)***
Colonial Bank of Asia v. Kerr [1889] 15 VLR 74 ***(cit)***
Shephard v. Midland Bank Plc [1987] 2 FLR 175 ***(refd)***
Ban Huat Seng Co. Ltd. v. Lee Poh Soo [1967] 1 MLJ 145 ***(cit)***
Hong Leong Equipment v. Manfo Development & Anor. [1986] 1 CLJ 417 ***(refd)***
Eng Mee Yong & Ors. v. Letchumanan [1979] 2 MLJ 212 ***(foll)***
Bank Negara Malaysia v. Mohd Ismail & Ors. [1992] 1 CLJ 653 / [1992] 1 MLJ 400 ***(refd)***

Legislation referred to:
Finance Companies Act 1969,
National Land Code 1965, s. 257(1)(a)
Rules of the High Court 1980, O. 42 r. 12

For the plaintiff - Walter B.C. Teoh; M/s. Cheong Wai Meng & Van Buerle
For the defendants - Abdul Rashid bin Abdul Karim; M/s. Yacob & Partners

JUDGMENT

Edgar Joseph Jr. SCJ:
This was an application by the second and the third defendants to set aside a judgment in default of defence on two separate grounds; namely, that the judgment was not regularly obtained and, in the alternative, that there was a defence on the merits.

The application was opposed by the plaintiff, a Finance Company ("the plaintiff company").

After hearing Counsel in chambers I had granted the application to set aside the judgment in default of defence on the ground that the judgment was not regularly obtained. But the plaintiff company being dissatisfied with my decision applied for further argument, and I acceded to that request, by hearing further argument about one week ago.

The history of the matter which calls for the consideration of the Court may be shortly stated.

The plaintiff company is and was at all material times to this suit a licensed finance company within the meaning of the Finance Companies Act 1969, carrying on the business, *inter alia*, of financing leasing transactions.

The first defendant is and was, at all material times to this suit, an incorporated company with its registered office at 2, Main Road, Sungai Lalang, Bedong, Kedah, ("the defendant company").

The second and the third defendants are husband and wife and were, and are, at all material times to this suit, directors of the defendant company.

By a lease agreement in writing dated 17 August 1982, made between the plaintiff company of the one part and the defendant company of the other part ("the lease agreement"), the plaintiff company had agreed to lease to the defendant company five units of equipment defined in the schedule thereto ("the equipment") upon the terms and conditions appearing therein.

It is necessary to advert to some of the more important provisions of the lease agreement so far as material to this case.

The lease agreement provided, *inter alia*, for the payment of a deposit of RM56,840, receipt whereof the plaintiff company duly acknowledged, and payment of the balance sum by 36 monthly rent instalments of RM8,779 each.

The lease agreement further provided that the defendant company had agreed, *inter alia*, as follows:

(1) to keep the equipment at 2, Main Road, Sungai Lalang, Bedong, Kedah.
(2) to pay interest at the rate of 2% per month flat on any monies payable under the lease agreement which might from time to time be overdue; and
(3) to pay the costs of repossession, storage, repair and maintenance of the equipment.

Now, in consideration of the plaintiff company agreeing to lease the equipment to the defendant company and entering into the lease agreement, the second and the third defendants had by a guarantee agreement in writing dated 17 August 1982 ("the guarantee") agreed to undertake and guarantee the payment by the defendant company of all sums of monies which might become payable by the defendant company under the terms and conditions of the lease agreement and the due performance and observance by the defendant company of the stipulations and conditions therein contained.

It was alleged by the plaintiff company that in breach of the lease agreement the defendant company had made default as follows:

(1) after payment of 14 rent instalments amounting to RM122,906, it had failed to pay any of the subsequent agreed rent instalments payable under the lease agreement; and
(2) the equipment had not been kept at the address stipulated in the lease agreement.

It was further alleged that by reason of the breaches aforesaid, the plaintiff company had given due notice thereof to the defendant company, and made repeated demands for the return of the equipment and/or for payment of the outstanding balance sum of RM249,964.40 (with particulars), yet the defendant company had failed to comply with the same.

It was contended, that by reason of the alleged breaches, the defendant company had repudiated the lease agreement.

Accordingly, by a letter dated 30 November 1983, the plaintiff company, through its solicitors, had accepted the defendant company's alleged repudiation and terminated the lease agreement with immediate effect.

It was further contended, that by reason of the matters aforesaid, the defendant company owed the plaintiff company a balance sum of RM249,964.40 and interest thereon at the agreed rate of 2% per mensem and, that despite repeated demands made by the plaintiff company, upon the defendants for payment, none of the defendants had made payment of the said sum or any part thereof, nor the agreed interest payable thereon.

The plaintiff company had, therefore, by their statement of claim prayed for judgment against the defendant company, the second and the third defendants, jointly and severally as follows:

(a) the said balance sum of RM249,964.40 together with interest thereon at the rate of 2% per month flat on RM8,779 from 29 November 1983 till date of payment or satisfaction;

(b) costs.

It is noteworthy that although the defendants had by their then solicitors M/s. Sharikat Vijaya & Co. entered an appearance to the writ which the plaintiff company had caused to be issued and served upon them, no defence had been filed with the result that the judgment in default of defence aforesaid had been entered against all three defendants and, it was not until some two and a half years later, that this application to set aside the judgment in default of defence was made on behalf of the second and the third defendants by their new solicitors M/s. Yacob & Rakan Rakan.

It would be convenient, if at this stage, I reproduced the judgment in default which had been entered by the plaintiff company against the defendants. It reads as follows:

> No defence having been served by the 1st, 2nd and 3rd defendants herein. It is this day adjudged that the 1st, 2nd and 3rd defendants do pay the plaintiff the balance sum of RM209,988.40 together with interest thereon at the rate of 2% per month flat on RM8,779 calculated from 29 November 1983 to date of payment or realisation and RM225 costs.
>
> Entered 27 September 1984.

I must next turn to consider the case for the second and the third defendants as it appears from their affidavits filed in support of their application to set aside the default judgment.

First of all, they had explained that their omission to file their defence which had resulted in judgment in default being entered against them was due to their ignorance of the rules of procedure and of their rights in the suit.

I need hardly say that this explanation is unacceptable since, as I have already noted, at the time when default judgment was entered against them they were represented by their former solicitors M/s. Sharikat Vijaya & Co. as is apparent from the appearance entered on their behalves to the writ of summons.

Be that as it may, as I have said, it was not until some $2^1/_2$ years later that the second and the third defendants retained the services of another firm of solicitors, to wit, M/s. Yacob & Rakan-Rakan, who then made this application to set aside the judgment in default of defence. However, no explanation was vouchsafed to this Court for the inaction and delay in their doing so.

Secondly, it was contended by Counsel on behalf of the second and the third defendants, that the judgment in default of defence had not been regularly obtained in that it provided for the payment by all three defendants of the balance sum of RM209,988.40 together with interest thereon at the rate of 2% per month flat on RM8,779 calculated from 29 November 1983 to date of payment or realisation, contrary to the provisions of O. 42 r. 12 of the Rules of the High Court 1980, in the form that it took prior to its amendment by PU (A) 445, dated 29 October 1986, and which was in the following terms:

> Every judgment debt shall carry interest at the rate of 8% per annum or at such other rate not exceeding the rate aforesaid as the Court directed such interest to be calculated from the date of judgment until the judgment is satisfied.

In other words, the contention of Counsel was that as at the material time the jurisdiction of the Court to award interest on every judgment debt in respect of the post judgment period was limited to a maximum sum under the provisions of O. 42 r. 12, in the form that it took prior to its amendment, to 8% p.a., yet the default judgment in this case purported to award a rate of interest on such sum and for such period, well in excess of that limit, the effect of which was that the default judgment had not been regularly obtained.

In support, the judgment of the High Court (V.C. George J.) in *Public Bank Bhd. v. Hara Industries* [1987] 1 CLJ 399 and the judgment of the Supreme Court (Lee Hun Hoe CJ (Borneo)) speaking for the Court) in *Supreme Finance (M) Berhad v. Koo Sin Ken* [1987] 1 MLJ 374, were cited.

In the *Supreme Finance* case, Lee Hun Hoe CJ, approving the judgment in the *Public Bank* case, said this:

> Clearly, where a judgment is recovered in respect of debt any other personal remedy for the same debt is extinguished or merged in the

judgment. In which case, under the Rules of the High Court 1980, O. 42 r. 12, the interest will be at the rate of 8% per annum or such other rate not exceeding 8% per annum as the Court directs from the date of judgment until satisfaction. Order 42 r. 12 makes no distinction between debts in respect of which the parties have made an agreement in respect of interest and those where there is no such agreement.

As I had occasion to point out in the case of *Malaysia Building Society Bhd. v. Lim Kheng Kim & Ors.* [1988] 3 MLJ 175, at 178 col. 2 C to F, when dealing with an issue identical to that which I am now considering, the Federal Court, (H.T. Ong CJ speaking for the Court), in the earlier case of *American International Co. Ltd. v. Union Builders (M) Sdn. Bhd.*, [1973] 1 MLJ 95, took a contrary view to that taken by Lee Hun Hoe CJ in the *Supreme Finance* case, in holding that the chargee's claim in that case was not on the covenant but in exercise of their statutory remedy against a chargor in default and so the personal remedy for the debt secured by the charge is not merged with the judgment.

And, I also went on to point out in the *Malaysia Building Society* case, (at p. 179 col 2 F to H) that the conflict of authority aforesaid, appeared to have been resolved by the Supreme Court, in the *Malaysian International Merchant Bankers Bhd. v. Dhanoa Sdn. Bhd.* [1988] 1 MLJ 257, which restored, at least by necessary implication, the judgment of the Federal Court in the *American International Co.* case, since it is authority for the proposition that an order for sale under s. 257(1)(a) of the National Land Code 1965, is not a judgment debt under O. 42, r. 12, that the doctrine of merger is without application in proceedings under the National Land Code to enforce a charge and so the covenanted rate of interest continues to apply until realisation notwithstanding the order for sale.

Having said that, I recognised, as I must, that all three of the last mentioned cases, namely, the *Supreme Finance* case, the *American International Assurance* case and the *Malaysian International Bankers Bhd.* case, were cases concerning applications to enforce a charge under s. 257(1)(a) of the National Land Code by way of an order for sale of the charged land.

However, in the *Malaysian Building Society* case, the plaintiffs had obtained judgment in default of appearance against the defendants under a joint and several guarantee for a judgment debt, which the defendants had later attempted to have set aside primarily on the ground that the judgment was not regularly obtained in that the plaintiff had entered judgment for a sum in excess of that which was lawfully due to the plaintiff; in particular, that it was not permissible for the plaintiff to obtain judgment for interest at the rate of 14% per annum for the post judgment period, regard being had to the provisions of O. 42 r. 12 of the Rules of the High Court 1980, in the form that it took prior to its amendment, which provided for interest at the rate of 8% per annum on post judgment debts.

On this point, I had held that it is permissible to enter judgment with interest on the judgment debt exceeding the statutory rate of 8% per annum if there was an independent covenant as to the rate of interest, in which event, the doctrine of merger would be inapplicable. In so holding, I had relied on a number of English authorities namely, *Popple v. Sylvester* [1883] 22 Ch. D 38, *Re Sneyd, ex parte Fewings* [1884] 25 Ch. D 338, *London Borough of Ealing v. El Isaac & Anor.* [1980] 2 AER 548 and *Lowry v. Williams* [1895] 1 IR 274 (CA).

The following passage in the judgment of Templeman LJ (as he then was) in the *London Borough of Ealing* case will repay reading:

> I do not for myself understand how a debt payable with interest until actual repayment can be merged in a judgment without interest or with a different rate of interest payable thereafter. The merger doctrine, which was upheld by this Court in *Re Sneyd* [1883] 25 Ch. D 338, may be due to the fact that, in former ages, high rates of interest marked the progress of the individual on the path to perdition; whereas; in this day and age, high interest rates mark the road towards national prosperity.
>
> Merger does not apply where there is an independent convenant nor does it apply to a security.

In the present case, the claim for interest was based upon Article 19 of the lease agreement which provided:

> **Article 19 (Interest on overdue payment)**
>
> Without prejudice to the rights of the lessor against the lessee under the terms of this lease agreement if the lessee fails to pay any sums or moneys whatsoever due under this lease agreement (including but not limited to the rent, the

agreed loss value and any costs and expenses advanced by the lessor on behalf of the lessee) the same shall bear interest at the rate described in Item (10) of the Schedule from the date due until payment is made in full by the lessee with such interest.

Item (10) of the Schedule referred to in Article 19, stipulates that the rate of interest is at 2% per month.

Clearly, the provisions of Article 19 are not merely ancillary but constitute an independent convenant for the payment of interest at the stipulated rate, within the meaning of the authorities cited.

But the point regarding this part of the case must be taken further.

The second and the third defendants were guarantors pursuant to the guarantee dated 17 August 1982, (annexed in the affidavit of Ooi Ban Huat marked as exhibit "OBH-1"). As such guarantors, and by virtue of the guarantee, they had expressly agreed to incur personal liability **as principal debtors** and not merely as sureties, in respect of **all sums due** by the lessee to the lessor under the lease agreement and **due performance and observance of all terms and conditions of the lease agreement.**

The material clauses of the guarantee were Clauses (1) and (2) which provided:

Clause (1)

In consideration of the lessor having agreed at the request of the guarantors to enter into the Equipment Lease Agreement with the lessee the guarantors hereby jointly and severally guarantee **as principal debtors** and not merely as sureties to the lessor the due and punctual payment by the lessee of **all sums payable by the lessee to the lessor under or pursuant to the Equipment Lease Agreement and due performance and observance by the lessee of all terms and conditions of the Equipment Lease Agreement on the part of the lessee** to be observed and performed thereunder and any variation thereof.
(Emphasis provided)

Clause (2)

In the event of the lessee failing to observe and perform any of the convenants undertakings stipulations and terms contained in the Equipment Lease Agreement on the part of the lessee to be observed and performed, the guarantors shall on demand indemnify the lessor and its assigns and successors in title against all losses damages cost or expenses or otherwise which may be incurred by the lessor and all actions, claims and demands which may be instituted or made against the lessor or in any way connected with or arising out of or incidental to the Equipment Lease Agreement.

By virtue of Clauses (1) and (2) of the guarantee agreement, Article 19 of the Equipment Lease Agreement was incorporated by reference into the guarantee agreement and applied to the second and the third defendants.

In the circumstances, I saw no reason to depart from what I had said in the *Malaysia Building Society* case, and I accordingly dismissed the objection that the default judgment in this case was not regularly obtained.

Thirdly, I had to consider the **alternative ground** advanced by Counsel for the second and the third defendants, namely, that there was a good defence on the **merits.** The burden of establishing this point, of course, rested on the second the third defendants.

The second and the third defendants had alleged in their affidavits filed in support of their application, that at the material time, they were unaware that the document dated 17 August 1982 and clearly entitled "Guarantee", was a guarantee and that the nature of the document was not fully explained to them. They had further alleged, that they were mistaken in thinking that what they had signed was the Equipment Lease Agreement. In the alternative, they had also alleged that the plaintiff company by its silence in not drawing their attention to the fact that the document concerned was a guarantee had innocently misrepresented its nature.

And, as for the third defendant, she had in addition alleged that her husband, the second defendant, had exerted undue influence over her and that she had signed the guarantee agreement merely in compliance with his wishes.

These allegations were, of course, denied by the plaintiff company in their affidavits in opposition filed on its behalf. In particular, the affidavit of the witness to the guarantee agreement Mr. Ooi Ban Huat affirmed on 6 June 1987, stated categorically, without contradiction by either the second or the third defendant, that before the execution of the guarantee agreement, he had fully explained the terms and

conditions thereof to the second and the third defendants.

Other considerations relevant to this part of the case are these. The guarantee agreement and the lease agreement were comprised in separate documents with materially different clauses. The second and the third defendants were, at all material times, directors of the defendant company. Indeed, the result of search of the records kept at the Registry of companies as to directors' shareholdings exhibited to the said affidavit shows, that at all material times, of the total number of shares of 800,002 in the defendant company, which had been taken up, the second defendant was a majority shareholder with 524,001 shares to his name, whilst the third defendant held 64,000 shares.

It can therefore be reasonably inferred from these facts that the second and the third defendants had a real stake in the defendant company, were persons possessing business acumen and must therefore have understood the nature and effect of the guarantee agreement. (See e.g. *Bank of China v. Maria Chia Soon Lan* [1976] 1 MLJ 41, at 45).

In other words, as directors and shareholders of the defendant company, it was their duty to know the nature and effect of the documents they were signing and thus it is impossible to give the slightest credence to their allegation that they were mistaken about the contents of the guarantee agreement or that there had been any misrepresentation, albeit innocent, on the part of the plaintiff company.

The very late stage at which they had chosen to raise the plea of *non est factum*, bearing in mind that they were, at all material times, represented by solicitors after the writ had been served upon them, points to the same conclusion. In particular, if there was so much as a particle of truth in this plea, I would have expected them to take this point by way of a statement of defence soon after their former solicitors M/s. Sharikat Vijaya & Co. had entered an appearance to the writ. Having regard to the surrounding circumstances, relevant to the issue of the validity of the guarantee agreement, which I have discussed, I accepted the version appearing in the uncontradicted affidavit of the attesting witness Mr. Ong, even though he was the plaintiff company's employee, as most probably true.

Certain considerations relevant to the third defendant's plea of undue influence may now be dealt with shortly.

There is ample authority to show that certain classes of relationship by themselves and nothing more do give rise to a presumption of undue influence; examples are: parent and child (see *Phillips v. Hutchinson* [1946] VLR 270), a person in *loco parentis* and his charge (see *Bank of New South Wales v. Rogers* [1941] 65 CLR), guardian and ward (see *Taylor v. Johnson* [1882] 19 Ch. D 603), doctor and patient (see *Radcliffe v. Price* [1902] 18 TLR 446), solicitor and client (see *Westmelton (Vic) Pty. Ltd. v. Archer* [1982] VR 305), spiritual adviser and a member of his congregation (see *Allcard v. Skinner* [1887] 36 Ch. D 145), a man and his fiancee (see *Yerkey v. Jones* [1939] 63 CLR 649 at 675) and perhaps trustee and beneficiary (see *Wheeler v. Sargeant* [1893] 69 LT 181.)

Most people would think that a conspicuous omission from the list aforesaid is that of husband and wife. However, the cases of *Yerkey v. Jones* [1939] 63 CLR 649, per Dixon J. at p. 675, shows that the approach of the Courts is that there is nothing unusual in a wife showing her affection for her husband in a tangible way, as for example, by guaranteeing repayment of his debts. And, so, it is said, that the affection and confidence inherent in the marital state does not *ipso facto* amount to undue influence, in the eye of the law. (See *Colonial Bank of A/asia v. Kerr* [1889] 15 VLR 74, 314).

I could not therefore hold, having regard to the authorities cited above, that simply by reason of the relationship of husband and wife existing between the second and the third defendants, a presumption of undue influence arose.

There were other aspects to the plea of undue influence which I had also considered in deciding this application.

It was nowhere even alleged in the affidavits filed in support of this application or by way of reply to the affidavits in opposition, that the plaintiff bank had exerted undue influence on the third defendant or that the plaintiff bank was aware of any undue influence allegedly exerted by the second defendant over his wife the third defendant, or that the plaintiff bank had entrusted a third party e.g. the second defendant, to procure the execution of the guarantee agreement.

In the case of *Shephard v. Midland Bank Pic* [1987] 2 FLR 175 at 181 Neill LJ enunciated the relevant principles as follows:

> The Court will not enforce a transaction at the suit of a creditor if it can be shown that the creditor entrusted the task of obtaining the alleged [guarantor's] signature to the relevant document to someone who was, to the knowledge of the creditor, in a position to influence the [guarantor] and who procured the signature of the [guarantor] by means of undue influence or by means of fraudulent misrepresentation.

I was therefore completely convinced that at all material times the second and the third defendants knew and approved of the contents of the guarantee agreement and that upon the affidavit evidence, the plea of undue influence was not available to the third defendant.

Going back a little, there is another aspect to the very late stage at which the second and the third defendants had chosen to raise the plea of *non est factum* and, in the case of the third defendant, the additional plea of undue influence - a delay of some two and a half years after judgment in default of defence had been entered - and this concerned the *bona fides* of their conduct in making the present application and whether it was barred by laches. (See *Ban Huat Seng Co. Ltd. v. Lee Poh Soo* [1967] 1 MLJ 145 per Ismail Khan J. (as he then was) at p. 147 col. 1 G to I).

The second and the third defendants had, as I have already noted, explained in their affidavits, that the reason for their inaction in filing a defence which had resulted in the default judgment being entered against them, was because of their ignorance of the rules of procedure and their rights in the suit. This explanation is transparently false since their former solicitors M/s. Sharikat Vijaya & Co. had entered an appearance on their behalves on 28 April 1984, so that at the time the default judgment was entered on 27 September 1984, they were in fact represented by solicitors and therefore must have known of their rights and duties, yet no defence was filed.

Indeed, the second and the third defendants did not bestir themselves even when the plaintiffs had caused a writ of seizure and sale to be issued against the defendant company's factory on 26 February 1985 (see Ex. CSH 5 to affidavit of plaintiff's Manager, Mr. Choo) although, being directors and shareholders of the defendant company, they must, at least by then, have known that the plaintiffs were actively enforcing the default judgment. On the contrary, they waited some two and a half years later before causing to be issued the application to set aside the default judgment.

In *Malaysia Building Society Bhd. v. Lim Kheng Lim (ibid)* at p. 184 Col. 2, at H, when dealing with the subject of delay in the context of a similar situation, I had held that a delay of one year and two months in applying to set aside a default judgment, gave rise to an inference of laches. In this context, the case of *Hong Leong Equipment v. Manfo Development & Anor.* [1986] 1 CLJ 417, 419 para 3, also merits reading. I appreciated, however, that it was question of fact in each case, whether the delay involved was so inordinate as to show that a party has been guilty of laches.

It is also clear law that a defendant who is seeking the indulgence of the Court to set aside a default judgment should make full, frank, candid and honest disclosure of all the relevant facts. (See *Hong Leong Equipment Sdn. Bhd. v. Manfo Development Sdn. Bhd. & Anor.* [1986] 1 CLJ 417 at 419).

In these circumstances, the inevitable conclusion at which I had arrived was that the second and the third defendants had been guilty of laches, their conduct had not been *bona fide* and there had been a deplorable lack of candour on their part.

I hasten to add that in considering the question whether the second and the third defendants had disclosed a defence on the merits, I was mindful of the rule that generally, if there is conflict of evidence which is not on the face of it implausible upon a question of fact which calls for the determination of a Court, such conflict ought not to be disposed of on affidavit evidence only, but should be determined at the final hearing. On the other hand, in the words of Lord Diplock when delivering the advice of the Privy Council in *Eng Mee Yong & Ors. v. Letchumanan* [1979] 2 MLJ 212 (at p. 217 col 2 D, E), which concerned an application for removal of a caveat registered against land, "although in the normal way it is not appropriate for a Judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact

which calls for further investigation every statement in an affidavit, however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be."

In *Bank Negara Malaysia v. Mohd Ismail & Ors.* [1992] 1 MLJ 400, the Supreme Court held, (at p. 408 D) that the principle of law aforesaid enunciated by Lord Diplock is applicable to all cases where a Judge has to decide a matter on conflicting affidavit evidence.

In all the circumstances, I reversed the order I had earlier made in chambers, dismissed the application to set aside the judgment in default of defence, and affirmed the judgment in default of defence entered against all the defendants. The second and the third defendants were also ordered to pay the costs of this application.

PUBLIC PROSECUTOR

v.

ABDUL MALIK B. MARAHAJI & ANOR.

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN J.
[CRIMINAL APPEAL NO. T(42)-3 OF 1994]
26 APRIL 1994

CRIMINAL APPEAL: Charge of corruptly accepting gratification - Section 4(a) Prevention of Corruption Act 1961 - Acquittal - Whether acquittal based on proper grounds - Whether s. 4(a) imposes a condition that the accused must be "on official duty" before a finding of guilt thereunder can be made.

CRIMINAL PROCEDURE: Whether s. 161 of the Indian Penal Code in pari materia with s 4(a) of the Prevention of Corruption Act 1961.

CRIMINAL PROCEDURE: Defence of alibi - Notice not given to prosecution - Whether evidence tending to support alibi to be excluded - Section 420A CPC.

The two accused were jointly charged with an offence under s. 4(a) of the Prevention of Corruption Act 1961 (the Act) read with s. 34 of the Penal Code. Both the accused were policemen and the evidence showed that on 26 February 1990 at about 3.30 a.m the two went to the complainant's house, and on discovering that the latter was an illegal immigrant told her that she had to pay a fine or else she would be taken to the police station. The first accused then demanded RM150 from the complainant but eventually accepted RM100 offered him by the complainant.

The learned Sessions Judge acquitted and discharged both the accused on the ground that the RM100 was not received corruptly as the accused were then not on official duty. In so deciding the learned Judge relied on the Indian Court decision in *Upendra Chondhurry v. Emperor* [1917] AIR 850, a decision on s. 161 of the Indian Penal Code, which the learned Judge said was in *pari materia* with s.4(a) of the Act. It was ruled in that case that acceptance of money by a public servant outside his official functions did not amount to an offence under the said s. 161.